BANDAR TEKNIK SDN BHD & ORS v. DESA SAMUDERA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG J
[CIVIL APPEAL NO: WA-12AC-1-01-2017]
27 JULY 2017

CIVIL PROCEDURE: *Interest – Judgment debt – Whether claim for post judgment interest arose upon default of payment of judgment debt – Stay of execution agreement pending outcome of appeal – Whether parties agreed to reserve right to post judgment interest – Whether contingent upon outcome of appeal – Whether successful party on appeal entitled to post judgment interest under O. 42 r. 12 of Rules of High Court 1980*

CIVIL PROCEDURE: *Striking out – Application for – Application to strike out claim for post judgment interest on judgment debt – Whether pleadings disclosed cause of action or some question fit to be decided by judge – Whether mere fact that case is weak and unlikely to succeed at trial could be ground for striking out – Whether issue on post judgment interest decided upon earlier – Whether there was serious conflict on material facts and conflict of evidence – Rules of Court 2012, O. 18 r. 19(1)(a), (b) & (c)*

The respondent ('defendant'), in a suit launched in 1998 against the appellants ('plaintiffs'), had claimed for damages for trespass and conversion, whilst the plaintiffs had counterclaimed for works done. Both claims were dismissed by the High Court on 6 May 2009. On appeal, the plaintiffs were awarded damages and the defendant's claim was dismissed by the Court of Appeal ('CA') on 2 September 2010. The pre-judgment period was almost 12 years but at the suggestion of the CA's panel, the plaintiffs agreed to limit it to six years. When the payment of the judgment debt was not forthcoming on 2 September 2010, the plaintiffs commenced execution proceedings, which led to the filing of an application for leave to appeal to the Federal Court ('FC') against the CA's judgment by the defendant. The parties, pursuant to a stay of execution agreement, consented to a stay of execution on the terms, *inter alia,* that: (i) the judgment debt be placed on an interest bearing account in the joint names of the solicitors pending the outcome of the appeal to the FC; (ii) term (i) was without the prejudice to the right of both parties on the issue of post judgment interest; and (iii) if the appeal was successful, the defendant would be entitled to the judgment debt plus accrued interest and if unsuccessful, the plaintiffs would be entitled to the judgment debt plus accrued interest. The FC dismissed the appeal on 13 December 2011. Pursuant thereto, the solicitors for the defendant directed the bank to unconditionally pay the judgment debt, including all accrued interests in the

A sum of RM154,815.01 to the plaintiff, which was duly released to the plaintiffs' solicitors. Thereafter, the plaintiffs demanded interest of the balance of the post judgment interest, which the defendant denied arguing that the agreed period of six years of pre-judgment interest on the judgment sum covered post judgment interest as well and demanded the return of the B sum of RM154,815.01. An attempt to settle the order as to whether the agreed term of six years would also include post judgment interest before the Deputy Registrar was unsuccessful resulting in the parties filing a motion for clarification before the CA. The CA dismissed the motion holding that it was *functus officio*. The plaintiffs therefore obtained leave to appeal to the FC. C However, the FC declined to answer the question posed holding that the matter was fact-sensitive.

Whilst the motion for clarification was pending before the CA, the defendant abandoned the clarification sought as being irrelevant and demanded the return of the sum of RM154,815.01 failing which they would commence D legal proceedings. Aggrieved, the plaintiffs filed an originating summons ('OS') in the High Court for a declaration that they were entitled to post judgment interest. Upon being served with the OS, the defendant objected to the application, stating that the motion to clarify the order was still pending before the CA and therefore, the OS was multiplicitous and the court had no E jurisdiction. The OS was struck out on the preliminary objection without being heard on its merits.

Upon the dismissal by the CA and the FC, there was no variation of the judgment and the parties were back to where they had first started. The plaintiffs wanted the CA to clarify that the agreement of pre-judgment interest F was strictly for six years only and that their statutory rights to proceed with post judgment on the judgment debt remained intact. The defendant, on the other hand, wanted the CA to state categorically that the interest of six years on the judgment sum included post judgment interest in that the interest of six years was all the interest the plaintiffs were allowed. The plaintiffs thus filed a fresh action in the Sessions Court premised on: (i) a judgment debt G which was governed by O. 42 r. 12 of the Rules of the High Court 1980 ('RHC') and which had statutory force; (ii) an agreement dated 29 September 2010 by the parties to reserve their rights on the issue of post judgment interest reproduced in a consent order; and (iii) r. 15 of the Rules of the Court of Appeal 1994 ('RCA'); and anyone of which would entitle it to judgment. H The defendant denied that they owed the balance sum of the post judgment interest and counterclaimed for the sum of RM154,815.01 being interest on the post judgment debt wrongfully released to the plaintiffs. The defendant further, in encl. 9, sought to strike out the plaintiffs' claim pursuant to O. 18 r. 19(1)(a), (b) and (c) of the Rules of Court ('ROC') on the grounds I that it did not disclose a reasonable cause of action and that the action was

frivolous, vexatious and an abuse of the process of the court. The Sessions Court Judge ('SCJ') allowed the defendant's application on the ground that *res judicata* applied and the matter had been decided by the CA and the FC when both courts had dismissed the clarification applications. Hence, this appeal by the plaintiffs. A

Held (setting aside order in encl. 9 with costs in the cause; affirming SCJ's decision in dismissing plaintiff's application for summary judgment): B

(1) So long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out. The power of the High Court to grant interest for post judgment period is found in s. 25(2) of the Courts of Judicature Act 1964 and para. 7 of the Schedule to the Act. It is clear that every judgment debt comes with and carries with it interest at the rate of 8% per annum. Any variation is only with respect to the rate of interest on the judgment debt and not with respect to forgoing interest on judgment debt. (paras 30, 34 & 37) C D

(2) Post judgment interest had not arisen on 2 September 2010, the date the judgment was pronounced. Only upon default of payment of the judgment debt would there arise a claim for post judgment interest. The pre-judgment period of six years could not denote interest which was not due. The attempts to clarify the judgment dated 2 September 2010 was unsuccessful as the CA held itself to be *functus officio* whilst the FC declined to adjudicate the matter which was held to be fact-sensitive. There was thus no judgment pronounced by the two courts and neither were there written grounds of judgment. Hence, as it is a statutory right and default position, in the absence of clear words in the judgment, the interest had not been disallowed. (paras 39-41 & 45) E F

(3) Further, by proviso to cl. 4 of the stay of execution agreement, in consideration of the plaintiffs agreeing to stay execution of proceedings, including the proceedings to wind up the defendant, the defendant had agreed to reserve the right of the plaintiffs to post judgment interest, which was placed on fixed deposit pending the outcome of the appeal to the FC. The proviso to post judgment interest on the judgment debt also preserved the rights of both parties to post judgment interest and was only contingent upon the outcome of the appeal to the FC. The words 'without prejudice to the right of both parties on the issue of post judgment interest' in cl. 4 of the agreement meant that there was every entitlement on the part of the successful party in the FC appeal to make an application for post judgment interest or to make a separate claim on post judgment interest under O. 42 r. 12 of the RHC. (paras 51 & 55) G H I

(4) Upon the defendant's appeal being dismissed by the FC on 13 December 2011, the post judgment interest became due. Hence, so much of it as had been earned was paid by the bank, including all accrued interests, to the plaintiffs' solicitors as being monies belonging to the plaintiff. There was no contractual obligation to pay the accrued interest otherwise. In the circumstances, there was no good reason why the claim should not go for trial. Any doubts on the intention of the parties in the stay of execution agreement must be ascertained at trial and not summarily determined and dismissed altogether by striking out the plaintiffs' claim at this stage. (paras 58, 63 & 64)

(5) The plaintiffs' claim was also premised on r. 15 of the RCA. Rule 15 clearly provides for successful parties entitlement to interest for such time as execution has been delayed by the appeal. It is equivalent to damages for detention of the judgment debt. Whether or not the CA had otherwise ordered when parties entered into a stay of execution agreement would be a matter that had to go for trial. The plaintiffs had asserted that they had included post judgment interests earned in the joint solicitors account was to be paid over to the plaintiffs should the defendant fail to set aside the judgment of the CA. The interests were indeed paid over to the plaintiffs and treated as going towards reduction of the 8% per annum of the judgment debt. (paras 65, 67 & 68)

(6) A court that clarifies its own order does not make a decision. Hence, a clarification did not vary the judgment of the CA and indeed it could not. The silence of the CA to clarify the judgment did not invariably mean that the parties had been persuaded to cap the interest at six years pre-judgment irrespective of when the judgment sum plus interest was finally paid. The CA must be presumed to have known the position of the law on post judgment interest under O. 42 r. 12 of the RHC and more so when it had been submitted upon. The FC too had declined to answer the question posed. Hence, in the absence of judgment pronounced by either the CA or the FC, *res judicata* did not apply to bar the plaintiffs' claim for post judgment interest. (paras 74, 79, 81, 82 & 87)

(7) Looking at the pleadings and the lengthy affidavits with various documentary exhibits filed therein, there was serious conflict on material facts and conflict of evidence particularly relating to the issue of what was agreed upon on 2 September 2010 and the clarification sought thereafter. This conflict could only be resolved by subjecting the deponents of the various affidavits to cross-examination and could only be evaluated by the court after seeing and hearing them. (para 93)

(8) The fundamental principle regarding the payment of interest is to compensate the claimant for loss of use of funds, not to mention, the statutory entitlement of the claimant to it. The plaintiffs' sought to be compensated for being kept out of the judgment debt for 13 months. The issue of whether the plaintiffs had agreed to waive this and to forgo interest post judgment would be something that had to go for trial. The question of why the plaintiffs as successful judgment creditors would want to forgo their post judgment interest would become apparent at the trial if indeed it was true. All that the plaintiffs had to show to resist the defendant's application to strike out the suit under O. 18 r. 19 of the ROC was some evidentiary basis to merit the action proceeding to trial. (paras 98 & 99)

Case(s) referred to:

Afad Sha Sdn Bhd v. SPPIK Dagang Sdn Bhd & Anor [1996] 3 CLJ 541 HC ***(refd)***

Anthony v. Tasmanian Alkaloids Pty Ltd (LDR 77/2000 2005 Tassc) 68 ***(refd)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bungsar Hill Holdings Sdn Bhd & Ors v. Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur & Another Appeal [2015] 1 CLJ 553 HC ***(refd)***

Charles Osenton and Company v. Johnston [1942] AC 130 ***(refd)***

Chong Su Kong & Ors v. Sia Hiong Tee & Ors; Messrs Johari & Zelika (Third Party) [2014] 10 CLJ 245 HC ***(refd)***

Farlim Properties Sdn Bhd v. Goh Keat Poh & Ors And Other Appeals [2003] 4 CLJ 505 CA ***(refd)***

Imperial Roadways Ltd v. Canadian Pacific Ltd (1982) 28 CPC 151 ***(refd)***

Jones and Others v. Secretary of State for Energy and Climate Change and Another [2014] 3 All ER 956 ***(refd)***

Moore v. Lawson (1915) 31 TLR 418 ***(refd)***

Othman & Anor v. Mek [1972] 1 LNS 103 FC ***(refd)***

Parker Flowerbulbs Pty Ltd v. Coulter [2004] 212 ALR 605 ***(refd)***

Perak Motor Co Sdn Bhd v. Estate Pekebun Kecil Sdn Bhd [2006] 4 CLJ 603 HC ***(refd)***

Puah Kim Yen & Ors v. Maju Steel Sdn Bhd [2013] 1 LNS 115 HC ***(refd)***

Ramal Properties Sdn Bhd v. East West-Umi Insurance Sdn Bhd [1997] 3 CLJ 598 HC ***(refd)***

Ratnam v. Cumarasamy & Anor [1964] 1 LNS 237 PC ***(refd)***

Re Lim Ah Hee, ex p Perwira Affin Bank Bhd [2000] 3 CLJ 354 CA ***(refd)***

Re Tan Sri Datuk Lau Gek Poh [2012] HKCU 392 ***(refd)***

Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(refd)***

Trengganu State Economic Development Corporation v. Nadefinco Ltd [1982] 1 LNS 46 ***(refd)***

Thein Hong Teck & Ors v. Tra Mining (Malaysia) Sdn Bhd & Ors [2013] 1 LNS 1486 HC ***(refd)***

A *Tong Lee Hwa & Anor v. Lee Yoke San [1978] 1 LNS 218 FC* ***(refd)***
Trans Elite Equipment Rental Sdn Bhd v. PSC-Naval Dockyard Sdn Bhd [2003] 4 CLJ 270 HC ***(refd)***
United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin [2002] 2 CLJ 413 FC ***(refd)***
Wenlock v. Moloney [1965] 1 WLR 1238 ***(refd)***

B **Legislation referred to:**
Civil Law Act 1956, s. 11
Courts of Judicature Act 1964, ss. 16(i), 25(2), Schedule para. 7
Evidence Act 1950, s. 40
Limitation Act 1953, s. 6(3)
C Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), O. 33 r. 3, O. 42 r. 12
Rules of the Court of Appeal 1994, rr. 15, 17
Rules of the High Court 1980, O. 42 r. 12

For the appellants/plaintiffs - Mahendran Ponniah; M/s RR Chelliah Brothers
For the respondent/defendant - Prem Ramachandran; M/s Kumar Partnership

D *Reported by S Barathi*

JUDGMENT

Lee Swee Seng J:

[1] The plaintiffs in the Sessions Court had appealed against the decision E of the Sessions Court Judge (SCJ) to strike out the plaintiffs' claim against the defendant for interest on a judgment debt. The defendant had applied in encl. 9 to strike out the plaintiffs' claim in that it does not disclose a reasonable cause of action and for being frivolous, vexatious and an abuse of the process of the court under O. 18 r. 19(1)(a), (b) and (c) of the Rules F of Court 2012 ("ROC").

[2] The plaintiffs' claim is founded on the following:

(i) O. 42 r. 12 of the Rules of the High Court 1980 ("RHC 1980") and which has statutory force;

G (ii) an agreement dated 29 September 2010 by the parties to reserve their rights on the issue of post-judgment interest on the judgment debt and reproduced/embodied in a consent order for stay of execution; and

(iii) Rule 15 of the Rules of the Court of Appeal 1994.

H **[3]** This case is the continuing saga of a case in Suit No. S1-2-484-98 launched in 1998 by the defendant here as the plaintiff there. The plaintiff there had claimed for damages for trespass and conversion and the defendants there, who are the plaintiffs here, had counter-claimed for work done. Both claims and counterclaims were dismissed by the High Court on 6 May 2009.

I

[4] On appeal to the Court of Appeal on 2 September 2010, the plaintiffs here were awarded damages in the Court of Appeal for the sum of RM3,290,000 and the defendant's claim there was dismissed. The prejudgment period was almost 12 years (22 September 1998 to 2 September 2010). At the suggestion of the Court of Appeal's panel, the plaintiffs agreed to limit it to six years. The principal judgment sum plus the prejudgment interest merged to form the judgment debt of RM4,919,200.

[5] Had the respondents settled the judgment debt on 2 September 2010 that would have been the end of the matter. But they only settled the judgment debt on 21 December 2012.

[6] When payment of the judgment debt was not forthcoming on 2 September 2010 the plaintiff commenced execution proceedings.

[7] The defendant then filed an application for leave to appeal against the Court of Appeal's judgment and by a stay of execution agreement between the parties entered into on 29 September 2010 a stay of execution was consented to *inter alia* on the following terms:

(i) the judgment debt be placed on an interest-bearing account in the joint names of the solicitors pending the outcome of the appeal to the Federal Court.

Solicitors for both parties were present before the bank to open a joint interest-bearing account in the names of the solicitors.

(ii) term (i) above was without the prejudice to the right of both parties on the issue of post-judgment interest.

(iii) if the appeal was successful, the defendant here would be entitled to the judgment debt plus accrued interest and if unsuccessful, the plaintiffs would be entitled to the judgment debt plus accrued interest.

[8] The plaintiffs submitted that the fact of the interest on post-judgment is a right that both parties wanted to preserve is very significant for it could only mean that the plaintiffs did not agree to waive their rights to post-judgment interest. It was also in the interest of the defendant to preserve their right to post-judgment interest for they were hoping that the Federal Court might agree with them and grant them the amount claimed, in which case the post-judgment interest would apply in their favour.

[9] The appeal to the Federal Court was eventually dismissed by the Federal Court on 13 December 2011.

[10] On 21 December 2011, solicitors for the defendant here, directed the bank unconditionally to pay the judgment debt of RM4,919,200 including all accrued interest to the plaintiffs.

[11] The fixed deposit was uplifted in the presence of both solicitors and the sum of RM5,074,015.01 (RM4,919,200 together with the accrued interest of RM154,815.01) was released to the plaintiffs' solicitors.

[12] As agreed under the stay of execution agreement dated 29 September 2010 parties reserved their rights on the issue of post-judgment interest. Upon the appeal being dismissed by the Federal Court on 13 December 2011, post-judgment interest became due. The defendant's solicitors on 21 December 2011 directed the bank unconditionally to make payment of the judgment debt including all accrued interest to the plaintiffs' solicitors as being monies belonging to the plaintiffs. There was no compulsion to pay the accrued interest otherwise.

[13] The plaintiffs thereafter demanded interest of the balance of the post-judgment interest of RM326,053.63 (RM480,868.64 less the sum of RM154,815.01 already paid to avoid double benefit).

Problem

[14] The defendant denied that they are liable to pay the post-judgment interest as they now argued that the agreed period of six years of pre-judgment interest on the judgment sum covered post-judgment interest as well and demanded the return of the sum of RM154,815.01.

[15] The relevant part of the judgment read:

> All judgment sums carry interest at the rate of 8% per annum from the date of filing of the counterclaim (22.9.1998) for the agreed term of six years.

[16] An attempt to settle the order as to whether the agreed term of six years would also include post-judgment interest before the Deputy Registrar on 26 November 2011 was unsuccessful. At the request of the Deputy Registrar, a joint motion before the same panel of Court of Appeal proved unproductive as the Court of Appeal held themselves *functus officio*.

[17] The plaintiffs obtained leave to appeal to the Federal Court. However, after leave was obtained and at the hearing proper, the Federal Court declined to answer the question posed as they held that the matter was fact-sensitive.

[18] Whilst the motion for clarification before the Court of Appeal was pending, the defendant here abandoned the clarification sought as being irrelevant and demanded the return of RM154,815.01 on 21 February 2013 failing which they would commence legal proceedings. Aggrieved, the plaintiffs filed an originating summons ("OS") in the High Court for a declaration that they were entitled to post-judgment interest. Upon being served with the OS, the defendant objected to the application, stating that the

motion to clarify the order was still pending before the Court of Appeal and therefore the OS was multiplicitous and that the court had no jurisdiction. The OS was struck out on the preliminary objection without being heard on its merits. The plaintiffs did not appeal against the decision of the High Court striking out the OS as they were of the view that the motion for clarification was still intact.

[19] With the dismissal by the Court of Appeal and subsequently by the Federal Court on 22 February 2016 there was no variation of the judgment. Parties were back to where they had first started. The plaintiffs had wanted the Court of Appeal to clarify that the agreement of pre-judgment interest was strictly for six years only and that their statutory rights to proceed with post-judgment interest on the judgment debt remains intact. The defendant on the other hand wanted the Court of Appeal to state categorically that the interest of six years on the judgment sum included post-judgment interest as in that the interest of six years was all the interest the plaintiffs here were allowed.

[20] Things came to a head when the plaintiffs here, on 25 June 2016, filed a fresh action in the Sessions Court, based on a different factual foundation which included their statutory right to claim for the remainder interest of RM326,053.63 on the judgment debt.

Pleadings

[21] The defendant cried foul and denied that they owed the balance sum of post judgment interest on the judgment debt. The defendant also counterclaimed for the sum RM154,815.01 being interest on the post-judgment debt wrongfully released to the plaintiffs as the defendant took the view that no post-judgment interest was granted by the Court of Appeal nor the Federal Court.

[22] The defendant further filed an application to strike out the writ and statement of claim on ground that the agreed period of six years on the judgment sum awarded on 2 September 2010 included what the plaintiffs are now claiming.

[23] Further, the defendant alleged that Court of Appeal and the Federal Court during clarification, had determined and disposed on merits the clarification sought ie, the agreed period of six years on pre-judgment interest included post-judgment interest as well and as such *res judicata* applied.

[24] The SCJ allowed on 17 November 2016 the application of the defendant with costs of RM3,000 chiefly on the ground that *res judicata* applies and that the matter had been decided by the Court of Appeal and the Federal Court when both courts had dismissed the clarification applications of the plaintiffs here. Against that decision, the plaintiffs as appellants here have appealed to this court against the said decision.

[25] In fact, the defendant had also in its counterclaim prayed to declare the plaintiffs as vexatious litigants and as the Sessions Court has no jurisdiction on this application, the case was being transferred to the High Court for hearing.

[26] For ease of reference and to avoid confusion, the parties shall be referred to as plaintiffs and defendant as they appeared in the Sessions Court.

Principles

[27] Generally, a court would not allow a claim to be struck out without proceeding for trial unless it is so obviously unsustainable or that it is frivolous or vexatious or otherwise an abuse of the process of the court.

[28] One need not go further than the Supreme Court's decision in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7. It distilled the law as follows at p. 11 para. e:

> The principles upon which the Court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v. Wilkinson* [1899] 1 QB 86, p. 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable" (*Attorney General of Duchy of Lancaster v. L. & N.W. Ry. Co.* [1892] 3 Ch. 274, CA). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v. Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871, CA.

[29] The tests for striking out application under O. 18 r. 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder* can be summarised *inter alia* as follows:

(a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;

(b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it **obviously unsustainable** (emphasis added)

(c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence;

(d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 of the ROC; and

(e) The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[30] It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (*Moore v. Lawson* (1915) 31 TLR 418 CA and *Wenlock v. Moloney* [1965] 1 WLR 1238).

[31] As this is an appeal from a decision of a lower court, learned counsel for the defendant drew my attention to the principle enunciated in the case of *Ratnam v. Cumarasamy & Anor* [1964] 1 LNS 237; [1965] 1 MLJ 228 at p. 229 (para C-D), where the Privy Council held as follows:

> The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton and Company v. Johnston* [1942] AC 130 p 229 per Lord Wright at 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans v. Bartlam* [1937] AC 473 p. 148).

[32] I also bear in mind the approach taken in the case of *Charles Osenton and Company v. Johnston* [1942] AC 130 (HL) at p.138, where the House of Lords held the following:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way.

Whether The Plaintiffs' Claim For Post-Judgment Interest Is A Fresh Cause Of Action Based On A Statutory Right

[33] The plaintiffs' cause of action is:

(i) premised on a judgment debt which is governed by O. 42 r. 12 of the Rules of the High Court 1980 and which has statutory force;

(ii) premised on an agreement dated 29 September 2010 by the parties to reserve their rights on the issue of post-judgment interest reproduced in a consent order;

(iii) premised on r. 15 of the Rules of Court of Appeal 1994; and

anyone of which will entitle it to judgment.

[34] The power of the High Court to grant interest for the post-judgment period is found in s. 25(2) of the Courts of Judicature Act 1964 and para. 7 of the Schedule to the Act. Section 25(2) of this Act states:

> Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule: Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

[35] Paragraph 7 of the Schedule to the Act then confers upon the courts the "power to direct interest to be paid on debts including judgment debts, or on sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the court".

[36] Order 42 r. 12 of the then Rules of the High Court 1980 provides as follows:

> **Every judgment debt shall carry interest at the rate of 8 percent per annum** or at such rate not exceeding the rate aforesaid as the court directs **(unless the rate has been otherwise agreed upon between the parties)**, such interest to be calculated from the date of judgment until the judgment is satisfied. (emphasis added)

[37] The words are clear. It is the default position that every judgment debt comes with and carries with it interest at the rate of 8% per annum. Little wonder that any variation is only with respect to the rate of interest on the judgment debt and not with respect to forgoing interest on judgment debt. If a judgment creditor chooses not to enforce interest on a judgment debt, that then is his prerogative. The law as it stood then granted interest on post-judgment debt as of right.

[38] The current Rules of Court 2012 appears to accommodate parties' agreement to forgo interest on post-judgment debt as can be seen below:

> Interest on judgment debts (O. 42, r. 12)
>
> 12. Subject to rule 12A, **except when it has been otherwise agreed between the parties**, every judgment debt shall carry interest at such rate as the Chief Justice may from time to time determine or at such other rate not exceeding the rate aforesaid as the Court determines, such interest to be calculated from the date of judgment until the judgment is satisfied. (emphasis added)

[39] Post-judgment interest had not arisen yet on the date judgment was pronounced on 2 September 2010. Only upon default of payment of the judgment debt would there arise a claim for post-judgment interest. The pre-judgment period of six years cannot denote interest which was not due.

[40] The plaintiffs' contention is that attempts to clarify the said judgment dated 2 September 2010 was unsuccessful as the Court of Appeal held itself to be *functus officio*. The Federal Court declined to adjudicate as they held that the matter was fact-sensitive.

[41] There was thus no judgment pronounced by either the Court of Appeal or the Federal Court and neither were there written grounds of judgment. No notes of proceedings nor court minutes were produced either.

[42] However in the defendant's application to strike out the plaintiffs' claim, the defendant contended that the Deputy Registrar, the Court of Appeal and the Federal Court during clarification made a determination with precision on the clarification sought.

[43] That seems to be contrary to what the defendant had stated on affidavit that the Court of Appeal was *functus* when asked to clarify the judgment pronounced. There is also evidence by the defendant's counsel, admitted during the course of clarification before the Court of Appeal and the Federal Court that the agreed period of six years was in respect of pre-judgment interest. The relevant part of the defendant's solicitors' averments read as follows:

> ... I humbly state in relation to paragraph 6 of the AIS that the act on the part of the Applicant to forgo a portion of the prejudgment interest is a wholly separate matter and was in accordance with the recommendation made by the Panel ... Given the foregoing, I humbly state that the Honourable court is *functus officio*.

[44] As pointed out above, the right of a successful claimant to post-judgment interest is a statutory right. For that to be taken away, it must be a case where the claimant, in this case the plaintiffs here, on successful appeal to the Court of Appeal, had relinquished or waived the post-judgment interest altogether.

[45] All we can say of the judgment of the Court of Appeal is that it is silent on post-judgment interest. It stands to reason that as it is a statutory right and default position, that interest has not been disallowed in the absence of clear words in the judgment.

[46] In practice, most counsel would be careful to make sure it is written into the judgment of the court. If it is not, it does not mean that the successful claimant has lost his right to post-judgment interest but simply that he would have to sue for it as indeed the plaintiffs are doing now in this Sessions Court writ of summons.

[47] The defendant can nevertheless argue that there was an agreement that post-judgment interest be waived as the agreement to pre-judgment interest of six years would cover post-judgment interest as well. However, this dispute is not one that is best suited to be decided by way of affidavit evidence as each side is taking diametrically opposite positions.

[48] At the trial, the court would of course want to hear from the plaintiffs why they could not be said to have foregone their post-judgment interests. Vital to this consideration would be why they would want to waive what was their statutory right under the old O. 42 r. 12 RHC 1980. The court would have to decide on the balance of probabilities whether it is reasonable for the plaintiffs to have freely and voluntarily agreed to confine themselves to a pre-judgment interest of six years and giving full liberty to the defendant to pay as and when they feel like it on the pain of execution as there would be no post-judgment interest that the defendant need to bother. More than that, would it be reasonable to have the use of the judgment debt with no incentive to pay but every incentive to delay and drag payment on the pain of execution as while the plaintiffs are deprived of the judgment debt, the defendant has the advantage of using the said money for whatever purpose they deem fit even if it be the mere putting of the judgment debt into an interest-earning account.

Whether The Plaintiffs Have A Valid Cause Of Action For Post-Judgment Interest Based On The Stay Of Execution Agreement Of 29 September 2010

[49] The plaintiffs' cause of action is also based on the stay of execution agreement dated 29 September 2010 hammered out between the parties because the plaintiffs were threatening a winding up action for inability of the defendant to pay a judgment debt.

[50] Assuming that the plaintiffs could not claim post-judgment interest because they had consented to the interest to be confined to just six years from the filing of their counterclaim and that they have waived post-judgment interest, there is then the terms of the stay of execution agreement at p. 272 record of appeal 2, that is enforceable by the plaintiffs.

[51] By the proviso to cl. 4 of the said stay of execution agreement, in consideration of the plaintiffs agreeing to stay execution proceedings including proceedings to wind up the defendant (para. 3), the defendant agreed to reserve the right of the plaintiffs to post-judgment interest, on the judgment debt of RM4,919,200 which was placed on fixed deposit pending the outcome of the appeal to the Federal Court. The proviso to post-judgment interest on the judgment debt also preserved the rights of both parties to post-judgment interest and was only contingent upon the outcome of the appeal to the Federal Court.

[52] Accordingly the stay of execution agreement contained an express proviso reserving the right of both parties on the issue of post-judgment interest.

[53] The issue of post-judgment interest is governed by O. 42 r. 12 of the RHC 1980. The consideration for agreeing to stay execution of the judgment was the right to post-judgment interest in the event the appeal by the defendant should fail and that the said sum be parked with the joint solicitors account as stakeholders pending the outcome of the appeal to the Federal Court by the defendant here. Otherwise, there was no reason for the plaintiffs to stay execution. They could and would have continued with execution proceedings and gotten their monies without having to wait for the outcome of the appeal. The defendant is estopped from rejecting the burden imposed on them having taken the benefit of the agreement. The agreement dated 29 September 2016 was embodied in a consent stay order which is way after the Court of Appeal's order of judgment of 2 September 2010. The consent stay order of 11 October 2010 provided at para (iii) that the consent order is without prejudice to the rights of the parties on the issue of post-judgment interest (exh. MKR 5 p. 49 appeal record I).

[54] In *Anthony v. Tasmanian Alkaloids Pty Ltd* (LDR 77/2000 2005 Tassc) 68 the court held:

> A stay order should be regarded as a separate action entered into after judgment.

[55] The words 'without prejudice to the right of both parties on the issue of post-judgment interest' in cl. 4 of the agreement meant that there was every entitlement on the part of the successful party in the Federal Court appeal to make an application for post-judgment interest or to make a separate claim on post-judgment interest under O. 42 r. 12 RHC 1980. See the case of *Re Tan Sri Datuk Lau Gek Poh* [2012] HKCU 392 p. 6 paras. 56, 58.

[56] A consent order is nothing more than an agreement for valuable consideration that has been entered into by parties entitling the aggrieved party to commence an action for failure of the defendant to pay the balance of the sum due. In the present case, the plaintiffs have a right to commence action against the defendant for failing to pay the balance of the post-judgment interest pursuant to the stay of execution agreement that was embodied in a consent order.

[57] The rationale for the proviso to the stay of execution agreement is this: in agreeing to a stay, the plaintiffs were going to be kept out of their money and the consideration was that in the event they should succeed in the appeal as in the Court of Appeal's decision being affirmed by the Federal Court, they will be entitled to interest as compensation for being kept out of their

monies. Likewise, if the defendant should succeed in their cross-appeal and was awarded damages, they would have been entitled to post-judgment interest.

[58] It was clear that both parties reserved their rights on the issue of post judgment interest. At that stage, it is anybody's guess what the outcome of the Federal Court would be. In the event the plaintiffs' claims are dismissed and the defendant's claims are allowed, then post-judgment interest shall go to the defendant. The defendant did not want to forgo this as there was no good reason to. Likewise, the plaintiffs were prepared to stay the winding up and other modes of execution as the judgment sum plus pre-judgment of interest of six years would be paid to a joint-solicitors' interest-bearing account. In fact, what happened was that upon the defendant's appeal being dismissed by the Federal Court on 13 December 2011, the post-judgment interest became due. Therefore so much of it as has been earned was paid by the bank to the plaintiffs following the defendant's solicitors instruction to the bank on 21 November 2011 directed the bank unconditionally to make payment of the judgment debt including all accrued interest to the plaintiffs' solicitors as being monies belonging to the plaintiffs. See p. 279 appeal record 2. There was no contractual obligation to pay the accrued interest otherwise.

[59] Was it an oversight on the part of the defendant's solicitors or perhaps more consistent with their understanding of the stay of execution agreement that the interest on post-judgment debt should be paid over to the plaintiffs as the Federal Court had dismissed the defendant's appeal and with that had affirmed the judgment of the Court of Appeal in favour of the plaintiffs?

[60] Even if the judgment is silent, yet there is still the stay of execution agreement that the plaintiff is now relying on to find its cause of action for the balance of the post-judgment interest.

[61] In *Parker Flowerbulbs Pty Ltd v. Coulter* [2004] 212 ALR 605 the Federal Court of Australia held that there is no reason why a judgment creditor should be deprived of interest that would otherwise automatically accrue from the time that judgment was entered merely because the judgment debtor has been granted a stay of execution.

[62] In *Jones and Others v. Secretary of State for Energy and Climate Change and Another* [2014] 3 All ER 956 the Court of Appeal in UK held that the payment of interest was contingent on the claim being successful and thus the liability to pay interest crystallised when the claim was successful.

[63] I see no good reason why this claim should not go for trial. Though the plaintiffs had applied for summary judgment for this claim in encl. 14, they nevertheless appreciate that the matter should proceed to trial as the defendant had raised issues that are fact-sensitive, requiring witnesses to be called.

[64] Any doubts on the intention of the parties in the stay of execution agreement that had been encapsulated in the consent stay order that would allow the plaintiffs to claim for post-judgment interest must certainly be ascertained at trial and not summarily determined and dismissed altogether by striking out the plaintiffs' claim at this stage.

Whether The Plaintiffs Have A Valid Cause Of Action For Interest On Post-Judgment Debt During The Period Of Stay Of Execution Of Judgment Pursuant To r. 15 Of The Rules Of The Court Of Appeal 1994

[65] The plaintiffs' claim is also premised on r. 15 of the Rules of the Court of Appeal 1994.

[66] As a result of the appeal filed by the defendant and the stay that was granted, the plaintiffs' execution of the judgment debt was postponed and the plaintiffs were denied interest until the appeal was heard and disposed of.

[67] Rule 15 of the Rules of the Court of Appeal 1994 clearly provides for successful parties entitlement to interest, for such time as execution has been delayed by the appeal pursuant to r. 15 of the Rules of the Court of Appeal 1994. It is equivalent to damages for detention of the judgment debt. It reads:

> 15. On any appeal, interest, for such time as execution has been delayed by the appeal, shall be allowed, unless the Court otherwise orders, and the Registrar may compute such interest without any order for that purpose.

[68] Whether or not the Court of Appeal has otherwise ordered when parties have entered into a stay of execution agreement that had been recorded as a consent stay order by the Court of Appeal would be a matter that has to go for trial as the plaintiffs have asserted that they have included post-judgment interests as part of the consideration for the stay and that the interests earned in the joint solicitors account is to be paid over to the plaintiffs should the defendant fail in the Federal Court to get the judgment of the Court of Appeal set aside. These interests were indeed paid over to the plaintiffs and treated as going towards reduction of the 8% per annum of the judgment debt that the plaintiffs said the defendant had agreed as part of the consideration for stay of execution.

Whether Res Judicata Applies To Bar The Plaintiffs' Claim For Post- Judgment Interest As Both The Clarifications In The Court Of Appeal And Federal Court Had Been Dismissed

[69] On the issue of *res judicata*, the defendant drew the court's attention to the landmark judgment of the Supreme Court in the case of *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 at p. 791 (CLJ); pp. 197 (para H-I) & 198 (para A-B) (MLJ), where the Supreme Court held the following:

A What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the
B truth; *res judicata pro veritate accipitur.* The public policy of the law is that, it is in the public interest that there should be finality in litigation – interest *rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action – *nemo debet bis vexari pro eadem causa* …

C **[70]** As pointed out by the defendant, there are specific provisions of law which bar a fresh action based on the doctrine of *res judicata* as in s. 40 of the Evidence Act 1950 which reads as follows:

Section 40.

D Previous judgments relevant to bar a second suit or trial:

The existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit … is a relevant fact when the question is whether the court ought to take cognizance of the suit …

E **[71]** Whilst perhaps things could have been clearer, what cannot be seriously disputed was that the attempt to clarify the order or judgment of the Court of Appeal of 2 September 2010 was unsuccessful as the Court of Appeal held that it was *functus*.

[72] It may be argued on behalf of the plaintiffs that the Court of Appeal
F would not be acting to take away a statutory right to interest on a post-judgment debt unless of course the plaintiffs had agreed, and the plaintiffs have vigorously and vehemently denied that. To the plaintiffs there was no good reason to have agreed to forgo post-judgment debt for then there would be no incentive for the defendant to pay.

G **[73]** I can appreciate the defendant's argument that conversely the Court of Appeal could have allowed the words "together with interest at the rate of 8% per annum on the judgment debt from the date of judgment to realisation" and parties would not be before the court today.

H **[74]** As I said things could have been clearer but I am not prepared to say that silence on the Court of Appeal to clarify must invariably mean that the parties have been persuaded to cap the interest at six years pre-judgment irrespective of when this judgment sum plus interest is paid finally. The Court of Appeal must be presumed to have known the position of the law on post-judgment interest under O. 42 r. 12 RHC 1980 and more so when

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it had been submitted upon. One can surmise that it was not expressly spelt out because the parties had not specifically drew the Court of Appeal's attention to the matter of post-judgment interest and so the default position would apply.

[75] The only hiccup would be that the plaintiffs would now have to make a separate claim for the post-judgment debt interest as they have done now. In the Canadian case of *Imperial Roadways Ltd v. Canadian Pacific Ltd* (1982) 28 CPC 151 the court entertained an application for post-judgment interest. The court held that under s. 40(1) of the Judicature Act the judgment bore interest from the time the judgment was pronounced. As the issue of post judgment interest was not raised, it had now to be dealt with and the trial judge had jurisdiction to do so.

[76] At this stage, we can only take note of the defence asserted by the defendant and which defence they had reaffirmed in their affidavits that there was an agreement when the Court of Appeal pronounced the judgment that parties were persuaded to agree not just to limit the pre-judgment interest to just six years but that this limitation of interest covers post-judgment debt interest as well.

[77] Surely that issue has to go for trial in a conflict of affidavits' evidence from both sides. To decide summarily would be to prejudge the matter without hearing the parties' oral testimonies of what happened on the day the Court of Appeal pronounced the judgment.

[78] When the matter reached the Federal Court, both sides were waiting expectantly for the Federal Court to answer the questions posed which includes whether the Court of Appeal may deny a successful claimant of post-judgment debt interest when O. 42 r. 12 RHC 1980 allows for it. To be precise, the question that was allowed to be referred to the Federal Court is as follows:

> Has the Court of Appeal the jurisdiction to make a fundamental variation of a radical nature of its own judgment on the substantive and statutory right of a successful party to post judgment interest under Order 42 Rule 12 of the Rules of the High Court 2012 by adding to the judgment an order denying the successful party of such interest, although the amendment does not concern the slip rule or that of its inherent jurisdiction to vary an order so as to carry out its own meaning on a mere clarification?

[79] The Federal Court in its wisdom had declined to answer the question posed as they were of the view that the matter was fact-sensitive. This fact has also been admitted by the defendant's counsel.

[80] One can appreciate why the Federal Court took that approach as if the plaintiffs had agreed on the waiver of post-judgment debt interest than the question does not arise.

[81] There was in a very real sense no judgment pronounced by either the Court of Appeal or the Federal Court and neither were there written grounds of judgment. No notes of proceedings nor court minutes were produced either.

[82] In the light of the above, can it be said that the issue of post-judgment interest has been determinatively decided by the Court of Appeal and Federal Court and with it, that *res judicata* applies? I do not think so. There are a legion of cases to support such a conclusion that there is no *res judicata* unless an issue has been specifically raised and determined with precision.

[83] What was clear was the stand and stance taken by the defendant through their learned counsel. In the affidavit in reply by Mr Mohana Krishan, learned counsel for the defendant dated 24 April 2012 filed in the Court of Appeal no. W02-1094-2009 the following statement was made by him in para. 6:

> ... I humbly state that this Honourable court is *functus officio*.

[84] Then at para. 27 of the defendant's counsel's written submission dated 12 March 2015 filed in the Federal Court No. 02(F)69-09-2014(W) where the defendant stated as follows:

> The Learned Justices of the Court of Appeal stated that there was nothing to clarify as the Broad grounds of Judgment was clear enough. The learned Justices of the Court of Appeal further pointed out that they were effectively *functus officio* given that the substantive appeal in respect of the COA Order had already been heard and disposed of in the Federal Court and judgment delivered on the 14.12.2011.

[85] It must not be forgotten that by the time the parties sought clarification, the Federal Court had disposed of the substantive appeal of the defendant against the judgment of the Court of Appeal in favour of the plaintiffs and dismissing at the same time the defendant's claim. There was then the issue of post-judgment interest because the defendant had taken the position that there was no such interest ordered and so the plaintiffs are not entitled to it.

[86] In the Federal Court Civil Appeal No. 02(F)-69-09/2014(W), Mr Mohana Krishnan, the defendant's counsel in the review application filed by the defendants to review the Federal Court's decision to dismiss the reference on the question of law posed, in an affidavit affirmed on 21 July 2015 stated in para. 24(1);

> I verily believe that this Honourable Court held that the nature of the Applicants appeal was fact-sensitive and on that basis declined to answer the question posed, which the appellate court is not prevented from doing.

[87] In all these clarification exercises and excursions, it must not be forgotten that a clarification does not vary the judgment of the Court of Appeal order and indeed it cannot. It merely clarifies and it is said that a court that clarifies its own order does not make a decision. The High Court in *Chong Su Kong & Ors v. Sia Hiong Tee & Ors* [2014] 10 CLJ 245; [2013] 10 MLJ 317 has held that clarification is not itself a judgment, order or decision but a clarification of some ambiguity. It did not change the judgment.

[88] What we have so far that cannot be seriously contested are as follows:

(i) there was nothing to clarify before the Court of Appeal as they took the view that they were *functus* as by then the decision had been affirmed by the Federal Court;

(ii) the Federal Court declined to answer the question as the appeal was fact-sensitive and the Federal Court is not in the habit of answering hypothetical questions;

(iii) the agreed six years was stated as applying to the pre-judgment period only;

(iv) the clarification of judgment was referred to the same panel of the Court of Appeal by the Deputy Registrar when he was unable to settle the order.

[89] In *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673; [2013] 5 MLJ 1 at p. 699 (CLJ); p. 18 (MLJ) the Federal Court held as follows:

> [44] … once a regularly obtained order or judgment had been perfected, the court was *functus officio*. The matter, as decided *vide* encl. 6, was thus *res judicata* and could not be re-litigated. The order made under encl. 6 was appealed and affirmed right up to the Federal Court. It could not now be revisited or re-asserted under any guise in a subsequent proceeding. The issues raised by the respondent in encl 29 could have been brought up during the appeal process. The law does not allow the respondent to have a second bite of the cherry and in the manner as it did.
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> … the re-litigation of a regularly and properly concluded matter as determined by the court is prohibited by the wide doctrine of *res judicata.* The judicial process rests on the twin pillars of certainty and finality. A final order or a judgment must therefore be vigorously protected by this doctrine.

[90] I have no problem with the above proposition of law. The question is whether at this stage one can say that the plaintiffs are not entitled to claim for post judgment interest unless they have waived their entitlement under O. 42 r. 12 RHC 1980. There was further the stay of execution of agreement reflected in the consent stay order where this right to post-judgment interest had been preserved and reserved by both parties.

[91] I agree with the plaintiffs that the court before whom this claim has been brought will need to consider these admitted facts when it looks at all the surrounding factors to weigh and evaluate contemporaneous documents and oral evidence that may tend to establish the truth or otherwise of the disputed fact as to whether the parties have agreed to confine interest on judgment sum to just pre-judgment period of six years or that parties have agreed to waive post-judgment interest or that the plaintiffs had not agreed to waive post-judgment interest though this interest element is stated in the judgment of the Court of Appeal.

[92] A full trial is necessary and should not be dispensed with and more so when the default position is that under the then O. 42 r. 12 RHC 1980 with interest at 5% per annum on the judgment debt from the date of judgment to realisation.

[93] I agree with the plaintiffs that looking at the pleadings and the lengthy affidavits with various documentary exhibits filed therein, there is serious conflict on material facts and conflict of evidence particularly relating to issue of what was agreed upon on 2 September 2010 and the clarification sought thereafter. This conflict can only be resolved by subjecting the deponents of the various affidavits to cross-examination and can only be evaluated by the court after seeing and hearing them.

[94] With respect to the OS that was filed by the plaintiff in the High Court before the motion of clarification was heard in the Court of Appeal, the plaintiffs were constrained to file it when the defendant declared the motion for clarification pending in the Court of Appeal irrelevant and demanded the return of RM154,815.01 on 21 February 2013. Upon being served with the OS, the respondents objected stating that the motion to clarify the order was still pending before the Court of Appeal and therefore the OS was multiplicitous and the court had no jurisdiction. The OS was struck out without being heard on its merits. Secure that the motion for clarification was intact, the plaintiffs did not appeal the decision. As the OS was not heard on the merits, there is no room for *res judicata* to apply.

Whether The Issue Of Post-Judgment Interest Has Been Disposed Of Determinatively And With Precision

[95] It is the defendant's contention that the clarification sought on the order dated 2 September 2010 has determined that the pre-judgment interest for the agreed term of six years on the judgment sum covered both pre-judgment interest and post-judgment interest and therefore *res judicata* applied.

[96] The plaintiffs on the other hand, took the stand that neither the Court of Appeal nor the Federal Court made any determination with precision in respect of the clarification sought.

[97] In the case of *Puah Kim Yen & Ors v. Maju Steel Sdn Bhd* [2013] 1 LNS 115 the defendant applied to strike out the case on grounds of *res judicata*. The High Court held that at p. 487 para. 26 F:

> ... the doctrine of *res judicata* has its roots in equity and is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result. The court referred to numerous authorities in support.

[98] In the present case, what the plaintiffs are asking is plain. They wanted to be compensated for being kept out of the judgment debt for 13 months from the date of judgment in the Court of Appeal where the High Court's decision to dismiss their counterclaim was reversed. They see no good reason why they should be kept out of the use of the judgment debt for that period when conversely the defendant as judgment debtor could have the benefit of the said judgment debt not paid out and earning interest presumably or being deployed to yield other investment returns. I accept that this is in keeping with the fundamental principle regarding the payment of interest to compensate the claimant for loss of use of funds, not to mention the statutory entitlement of the claimant to it. The issue of whether or not the plaintiffs had agreed to waive this and to forgo interest post-judgment would be something that has to go for trial. The question of why the plaintiffs as successful judgment creditors would want to forgo their post-judgment interest would become apparent at the trial if indeed it is true.

[99] All that the plaintiffs have to show at this stage to resist the defendant's application to strike out the suit under O. 18 r. 19 ROC is some evidentiary basis to merit the action proceeding to trial.

[100] Far from being caught by *res judicata*, the plaintiffs' action in the present case is premised on distinct and separate causes of action which include the stay of execution agreement to reserve the right to post-judgment interest, the terms of which were embodied in a consent order, its statutory right under O. 42 r. 12 Rules of the High Court 1980 and the remedy under r. 17 of the Rules of the Court of Appeal.

[101] As a clarification is not itself a judgment, order or decision but a clarification of some apparent ambiguity, no decision is made. This is even clearer when as in this case, there was no variance to the order after the clarification. It does not change the order which has been pronounced but only serves to make clear what might have appeared to be cloudy. See *Chong Su Kong & Ors v. Sia Hiong Tee & Ors; Messrs Johari & Zelika (Third Party)* [2014] 10 CLJ 245; [2013] 10 MLJ 317.

[102] In *Farlim Properties Sdn Bhd v. Goh Keat Poh & Ors And Other Appeals* [2003] 4 CLJ 505; [2003] 4 MLJ 654, on almost identical issues with the present case, the principal issue for determination was whether the Federal Court decision and the Court of Appeal decision in the aforesaid cases had decided with precision the point in issue and the court held at p. 516 (CLJ); p. 666 (MLJ) para. E:

> When the plea of *res judicata* is raised it is necessary to identify with precision the issue that was decided in the earlier proceedings. In *Tong Lee Hwa & Anor v. Lee Yoke San* [1979] 1 MLJ 24, Chang Min Tat FC held that to constitute a *res judicata*, the earlier judgment must in terms of the Privy council decision in *Kok Hoong v. Leong Cheong Kweng Mines Ltd* [1964] MLJ 49 'necessarily and with precision' determine the point in issue.
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> ... It is trite law that for *res judicata* to apply the proceedings must have resulted in a final judgment or decree, that is to say, the one which adjudges the ultimate rights of the parties of finally puts the case out of court. (page 666 para I).

[103] The court in *Ramal Properties Sdn Bhd v. East West-Umi Insurance Sdn Bhd* [1997] 3 CLJ 598; [1998] 5 MLJ 233 held, at p. 613 (CLJ); p. 290 (MLJ), para G that for *res judicata* to apply, the existence of a previous judgment is the very essence and a *sine qua non* for the doctrine of *res judicata*:

> It is evident that the existence of a previous judgment is the very essence, and *sine qua non* of the doctrine of *res judicata*. Without a previous judgment on the merits of the cause of action or issue, there is simply no *res judicata*, for *'res'* simply means 'a thing' and *'judicata'* means 'adjudicated'. Having held that *res judicata* could not apply to the instant case, it followed therefore that the plea of estoppel must perforce equally fail.

[104] The court in *Thein Hong Teck & Ors v. Tra Mining (Malaysia) Sdn Bhd & Ors* [2013] 1 LNS 1486; [2013] MLJU 249 held that for *res judicata* to apply, there must be a decision on merits. The court went on to hold that the parties arguments are irrelevant insofar as the court has not made a final decision on a specific point. In determining if a decision was made the court needs to look at the notes of evidence and if there is no reason given for its decision it is unlikely that a court in later proceedings will find that there is identity of the subject matter and bar a claim for *res judicata*.

[105] The Federal Court in *Tong Lee Hwa & Anor v. Lee Yoke San* [1978] 1 LNS 218; [1979] 1 MLJ 24 held that it had not shown that the court had with precision determined the point in issue and therefore *res judicata* did not apply as can be seen at p. 24 para. G as follows:

> At the hearing of the appeal, it was put to counsel for the appellants that to constitute a *res judicata*, the earlier judgment must judgment must in terms of the Privy Council decision in *Kok Hoong v. Leong Cheong Kweng Mines Ltd* [1964] MLJ 49 'necessarily and with precision' determine the point in issue and he was asked to indicate to the court how the earlier judgment did necessarily and with precision determine the liability of the appellants to pay the respondent for work done. He did not do so.

[106] In the case of *Afad Sha Sdn Bhd v. SPPIK Dagang Sdn Bhd & Anor* [1996] 3 CLJ 541; [1997] 4 MLJ 90 the court held that both parties were at diametrically opposed views on this, it became necessary for the court to read the minutes of the entry of the court file to know with precision what had been decided. The court there had the benefit of the minutes. At p. 550 (CLJ); p. 100 (MLJ) it was observed as follows:

> It was the submission of En Faiz for the defendants that when Abdul Malek bin Hj Ahmad J rejected his application for stay (encl. 30) he had said clearly that since there was no appeal pending (as the Court of Appeal had already dismissed the defendants' application for leave to appeal to the Court of Appeal) there was no basis to continue with the hearing of encl. 30. He contended that therefore the issue of *locus standi* of the plaintiff was not decided at that time.
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> At this stage since both parties were at diametrically opposed views on this, it became necessary for the court to read the minutes of the entry of the court file on 4 October 1995. I read aloud the minutes as produced above for both counsel to hear. *The minutes showed that the learned judge did not make a decision even though he heard submissions and he dismissed the application on the basis that since there was no appeal there was no reason for a stay to be granted. It must be noted that the learned judge had heard arguments and reserved judgment. However, before he could decide the Court of Appeal had already dismissed the defendants' motion.*
>
> On this issue alone I decided that there was no question of the principle of *res judicata* being applicable and rule against the plaintiff in its preliminary submission. I then called upon En Faiz to address me fully on his application. (emphasis added)

[107] At the risk of being repetitive, the Court of Appeal declined to clarify as they were of the view that the order was clear and that they were *functus* anyway. The Federal Court declined to answer the questions of law posed as they were of the view that the matter is fact-sensitive.

Whether To Strike Out The Plaintiffs' Claim For Post-Judgment Interest At This Stage Before Trial Would Be To Allow The Defendant To Unjustly Enrich Themselves

[108] In the case in *Perak Motor Co Sdn Bhd v. Estate Pekebun Kecil Sdn Bhd* [2006] 4 CLJ 603; [2006] MLJU 386, the court followed the principle enunciated in *Trengganu State Economic Development Corporation v. Nadefinco Ltd* [1982] 1 LNS 46; [1982] 1 MLJ 365 which referred to the purpose of awarding interest.

[109] In *Perak Motor Co (supra)*, what happened was that Perak Motor was required to pay a judgment sum to Espek, the defendant, together with interest for pre-judgment of 14% per annum and post-judgment interest at 8% per annum. On appeal, the Court of Appeal had slashed down the pre-judgment interest to 8% per annum and also reduced the period of interest from date of filing of the writ to date of judgment.

[110] As Perak Motors had paid over the judgment debt and interest in the meanwhile, of RM817,453.37 to Espek they sought a declaration from the High Court that the defendant has been unjustly enriched and filed an application for a declaration that the defendant among others have derived a benefit when they retained an excess sum of RM265,117.57 which was not paid gratuitously to them and having retained the said sum for six years and enjoyed benefits for the use thereof.

[111] The plaintiff, Perak Motor, further sought a declaration that they are entitled for the return of a sum amounting to RM121,038.88 being the interest quantified on the said amount retained by the defendant from 1 July 1984 to 15 October 2002.

[112] Following the above decision of the Court Of Appeal reducing the rate of interest from 14% to 8% there was therefore an overpayment of RM265,117.57 by Perak Motor (hereinafter referred to as overpayment sum). On 15 November 2002, solicitors for Perak Motors wrote to Espek requesting for the refund of RM265,117.57 and a further sum of RM121,038.88 being interest calculated at 8% per annum on the said overpayment sum as exhibited in exh. "YTC2" of encl. 2. On 17 February 2003 Espek refunded the overpayment sum of RM265.117.57 and *via* a letter dated 18 February 2003 Perak Motor's solicitors accepted the said sum on a without prejudice basis and were still demanding for the interest amount of RM121.038.88 as shown in exh. "YTC5" of the same enclosure.

[113] Perak Motors prayed for a declaration among others that they were entitled to recover the said sum of RM121,038.88 which represents the interest on the overpayment sum of RM265,117.57 which Espek had benefited from. The High Court held as follows:

Foremost in the plaintiff's contention is the principle of restitution and unjust enrichment. For the last seven years (from 17.3.1997 to be exact), Espek has retained the overpayment sum and has benefited from it. To allow Espek to keep the money and claimed benefits from it in the form of interest and for its use which rightfully is not theirs would amount to unjust enrichment and that would in turn entitles Perak Motor to claim for restitution.

Unjust enrichment and restitution goes hand and hand. Justice Gunn Chit Tuan (as he then was) in *New Kok Ann Realty Sdn. Bhd. v. Development & Commercial Bank Ltd New Hebrides (in liquidation)* [1987] 2 MLJ 57 in quoting the English decision of *Fibrosa Spolk Akeyjna v. Fairbairn Law Son Combe Barboer Ltd.* [1943] AC 32 stated at page 64:

> It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money off or some benefit claimed from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called *quasi* contract of restitution.

[114] Further, it was held:

Unjust enrichment as a principle of justice has been explained by Lord Goff of Chieveley and Gareth Jones QC in *The Law of Restitution* (Fifth Edition) at page 11:

> Most mature systems of law have found it necessary to provide outside the fields of contract and civil wrongs for the restitution of benefits on grounds of unjust enrichment. There are many circumstances in which a Defendant may find himself in possession of a benefit which, in justice, he should restore to the Plaintiff. Obvious examples are where the Plaintiff has himself conferred the benefit on the Defendant through mistake or compulsion. To allow the Defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff's expense, and this, subject to certain defined limits, the law will not allow. Unjust enrichment is simply, the name which is commonly given to the principle of justice which the law recognises and gives effect to in a wide variety of claims of this kind.

The principle of unjust enrichment and restitution has found a place in our legal system which is embodied in Section 71 of the Contracts Act 1950. The section provides:

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

A Section 71 of the Contracts Act 1950 is similar to Section 70 of the Indian Contract Act. According to Pollock and Mulla on the *Indian Contract and Specific Relief Act* (9th Edition) at page 497 there is good authority for saying that Section 70 of the Indian Contract Act was framed within its present form with a view to avoid niceties of English Law on the subject of *quasi* contract. According to the authors of the said book the section B is not founded on contract but embodies the equitable principle of restitution and unjust enrichment. According to them the principle of unjust enrichment falls under Section 69 and 70 (Section 70 and 71 of our Contract Act). But these sections are wider in scope than the doctrine as applied in England and go far beyond it.

C The terms of Section 71 of the Contracts Acts 1950 are unquestionably wide but applied with discretion they enable the Courts to do substantial justice in cases where it would be difficult to impute to the person's concerned relations actually created by contract. (See: *New Kok Ann Realty Sdn. Bhd. v. Development and Commercial Bank Ltd. New Hebrides (in liquidation)* (above)).

D On the facts of the case, it is without doubt that in so retaining the overpayment sum, Espek has been unjustly enriched. The payment made by Perak Motor in consequence of the Judgment of the High Court is far from being gratuitous and Espek has actually enjoyed the benefits from its retention. *The money must have been made use of or could have been used and* E *even if it has not been so, it would have earned interest. Espek has definitely done the right thing in refunding the sum of RM265,117.57 to Perak Motors for no Court of law would have allowed them to do so. The benefit which Espek has gained by retaining the overpayment sum may be quantified in the form of interest that the said sum would have earned during the period. That benefit rightfully must belong to Perak Motors and they must be granted the right to enjoy such benefit.* (emphasis F added)

[115] It can be seen that though the Court of Appeal did not state that the plaintiff should be entitled to interest on the amount overpaid for the period during which the defendant Espek had wrongly withheld the monies, that was no bar or prohibition against the plaintiff claiming both on the ground G of unjust enrichment and restitution.

[116] The plaintiffs castigated the failure on the part of the defendant in the present case lay in their failure to recognise and approach interest in two distinct stages – that for pre-judgment interest (covered by s. 11 of the Civil Law Act 1956) and post-judgment interest (covered by O. 42 r. 12 Rules of H the High Court 1980) as follows:

(i) Pre-judgment period – the length and extent of compensation of the pre-judgment period differs according to the circumstances of the case (eg. reason for the delay in prosecuting the case, etc) and what is reasonable is left to the discretion of the court. (s. 11) I

(ii) Post-judgment period – interest is governed by the relevant statutory provisions (s. 16(i) of the Courts of Judicature Act 1964) and Rules of Court 2012 or its predecessor the RHC 1980 (O. 42 r. 12) concerning the period (date of judgment to realisation).

[117] The court in *Bungsar Hill Holdings Sdn Bhd & Ors v. Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur & Another Appeal* [2015] 1 CLJ 553; [2015] 8 MLJ 317 at p. 329 para. 23-25 and p. 331 paras. 35, 46 explained the distinction between pre and post-judgment interest with lucid clarity.

[118] Arising out of the failure to appreciate the above, the plaintiffs argued, the defendant has now erroneously contended that the plaintiffs are asking for more monies on the judgment sum. What the plaintiffs are now claiming is their entitlement to post-judgment interest which no court has deprived them of and more than that which statutorily they are entitled to and which they said they have not waived or forgone. They should be allowed their day in court for otherwise the specter of the defendant having unjust enriched themselves at the expense of the plaintiffs would be hovering over this case.

[119] There are merits in the submission of the plaintiffs that they are not asking for more monies on the judgment sum. They are asking to be compensated for being kept out of the judgment debt for 13 months. It is in keeping with the fundamental principle regarding the payment of interest which is to compensate the claimant for loss of use of funds. It is provided for statutorily. (O. 42 r. 12 of the RHC 1980; r. 17 of the Rules of the Court of Appeal 1994). It was only fair that where a person had kept another out of funds, he should be held liable for the loss of use of the funds. Section 6(3) of the Limitation Act 1953 provides that an action to recover arrears of interest must be brought within six years of the judgment and it distinguishes between pre and post-judgment interest. See *Re Lim Ah Hee, ex p Perwira Affin Bank Bhd* [2000] 3 CLJ 354; [2000] 3 MLJ 211.

[120] The plaintiffs are invoking the power of the court in accordance with the Rules of the High Court 1980, O. 42 r. 12 for the order in respect of post-judgment interest on the judgment debt. The language used in O. 42 r. 12 RHC 1980 is mandatory in that "every judgment shall carry interest at the rate of 8% per annum ..."

[121] The plaintiffs were kept out of the judgment debt from 2 September 2010 to 21 December 2011 when it was finally paid. The Court of Appeal in *Re Lim Ah Hee, ex p Perwira Affin Bank Bhd* [2000] 3 CLJ 354; [2000] 3 MLJ 211 stated at p. 360 (CLJ); p. 217 (MLJ) para. A that:

A

> The correct interpretation of the second limb of s. 6(3) of the Limitation Act concerns post judgment interest and not the award of interest up to the date of judgment (pre judgment interest) as the latter together with the principal sum awarded in the judgment themselves constitute the judgment debt. **Any interest due after the date of judgment is limited to six years and a creditor can recover it by way of a fresh action.** (emphasis added)

B

[122] In *Trans Elite Equipment Rental Sdn Bhd v. PSC-Naval Dockyard Sdn Bhd* [2003] 4 CLJ 270; [2003] 4 MLJ 30 the court dealt with pre and post-judgment interest comprehensively and defined the meaning of judgment debt as including both the principal sum and the pre-judgment interest which merged to constitute the judgment debt. It was held at p. 279 paras. f-h, p. 280 para. a:

C

> [1] That the post-judgment interest on the "judgment debt" ought to have been on the total sum of both the principal sum and the pre-judgment interest for the following salient reasons:
>
> D
>
> (1) that both the principal sum and the pre-judgment interest (which represented damages for the period in which the plaintiff could not use the principal sum) merged into the judgment debt on 24 June 2002;
>
> E
>
> (2) this is prescribed by statute, namely O. 42 r. 12 of the Rules of the High Court 1980, and there was no room, at all, for the exercise of discretion by the learned SAR to award post-judgment interest on only the principal sum and not the judgment debt; and
>
> (3) the awarding of post-judgment interest on both the principal sum and the pre-judgment interest was practised in Malaysia as well as in Singapore.

F

[123] Abdul Malik J (as he then was) stated at pp. 277 and 278 that the merger principal has been espoused universally and in particular by the Singapore courts:

G

> *NM Rothschild & Sons Ltd v. Rumah Nanas Rubber Estate Sdn Bhd* [1994] 2 SLR 160
>
> *Chia Ah Sng v. Hong Leong Finance Ltd* [2001] 1 SLR 591 54

[124] Balia Yusof bin Hj Wan J (now FCJ) followed the approach of Abdul Malik J (as he then was) regarding merger in *Perak Motor Co Sdn Bhd v. Estate Pekebun Kecil Sdn Bhd* [2006] 4 CLJ 603; [2006] MLJU 386 at p. 3 last paragraph.

H

[125] The merger principle was also recognised in *United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin* [2002] 2 CLJ 413 (FC).

I

[126] The merger principle was recently applied in *Bungsar Hill Holdings Sdn Bhd & Ors v. Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur & Another Appeal* [2015] 1 CLJ 553; [2015] 8 MLJ 317 at p. 330, which also clearly distinguished the mandatory nature of O. 42 r. 12 which carries interest for the post-judgment period and discretionary nature of pre-judgment interest under s. 11 of the Civil Law Act 1956.

[127] I agree that the plaintiffs are not seeking further interest on the judgment sum but their statutory right to interest on the judgment debt, which as a cause of action is a horse of totally different colour from the clarification sought on the judgment sum; borrowing the language and drawing inspiration from the Federal Court case in *Othman & Anor v. Mek* [1972] 1 LNS 103; [1972] 2 MLJ 158. After the defendant's appeal to the Federal Court had been dismissed, the liability to pay post-judgment interest to the plaintiffs crystallised following the stay of execution agreement and the plaintiffs are seeking to enforce their right to post-judgment interest.

Pronouncement

[128] For the reasons given above, I had allowed the appeal from the decision of the Sessions Court to strike out the plaintiffs' claim. As it is the defendant also has a counterclaim for a refund of the interest paid arising from the putting of the judgment debt into an interest-earning account before the release to the plaintiffs upon the Federal Court affirming the decision of the Court of Appeal in the appeal proper.

[129] As that is going for trial since there is no application for summary judgment on that counterclaim by the defendant, the trial of the plaintiffs' action will involve the same issues and fact-finding exercise that would straddle both claim and counterclaim in that if there had been an agreement to forgo interest on post-judgment by the plaintiffs then correspondingly the interest paid erroneously has to be refunded. No further court's time in that sense will be involved as the trial court would still have to hear the defendant's counterclaim and also the application that the plaintiffs be declared "vexatious litigants".

[130] The same would apply if the stay of execution agreement and the consent stay order was to preserve the rights of both parties to post-judgment interest.

[131] The order of the SCJ in encl. 9 was set aside with costs in the cause. For completeness, the decision of the SCJ in dismissing the plaintiffs' summary judgment application in encl. 14 is affirmed.